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No. 76-284

In the Supreme Court of the United States

OCTOBER TERM, 1976

SUN SHIPBUILDING & DRY DOCK CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, the Sun Shipbuilding & Dry Dock Co. ("Sun"), seeks review of a decision of the Secretary of Commerce establishing the amount of additional compensation due petitioner for work performed pursuant to authorized changes made in a standard government construction-differential subsidy contract. The Court of Claims held that the Secretary's decision, which awarded petitioner \$3,070,547.95, was supported by substantial evidence (Pet. App. A27).

1. In 1962, petitioner entered into a contract with the United States, acting through the Maritime Subsidy Board (the Board), and United States Lines ("USL"). The contract provided that petitioner was to construct five cargo vessels for USL. In turn, USL was to pay 51.4 percent of the \$52,950,000 purchase price while the United States was to pay the balance as a construction-differential subsidy pursuant to the Merchant Marine Act of 1936, 49 Stat. 1995, as amended, 46 U.S.C. 1151 *et seq.*

During construction of the vessels, USL, with the approval of the Maritime Subsidy Board, issued two change orders to provide for the automation of the engine rooms (Change Order 23) and to reduce the size of the crew quarters in each vessel (Change Order 48) (Pet. App. A 31). Petitioner constructed the five vessels in accordance with the modified contract except that it delivered the vessels to USL 44, 33, 47, 48 and 60 days beyond the respective delivery dates stated in the contract (Pet. App. A7).

When the parties were unable to agree on the amount of the additional compensation due Sun for the extra work occasioned by Change Orders 23 and 48, Sun submitted to the contracting office a formal claim in the amount of \$5,218,516 plus a ten percent profit, for a total of \$5,740,368 (Pet. App. A7-A8). On August 21, 1969, the contracting officer determined that Sun was entitled only to \$2,200,000 including profit as the fair and reasonable value of the work performed pursuant to Changes 23 and 48. Both Sun and USL appealed to the Maritime Subsidy Board. Sun revised its claim to \$6,688,895, while USL asserted that only \$1,611,042 was allowable. Staff counsel for the Board contended that \$2,040,003 was the appropriate sum (Pet. App. A9). *6150*

The claim by Sun for greater compensation was based on several factors. Most important, Sun claimed that the modifications prevented it from adhering to an advantageous expedited schedule (the "delay" issue) and forced it to lay off experienced workers and later replace them with less experienced workers (the "hire-fire costs" issue). The parties also disagreed on the normal capacity of Sun's shipyard to work on new-hull construction (the "normal hull production rate" issue).

Following extensive hearings, and *de novo* consideration, the Board's hearing examiner issued an exhaustive decision (Pet. App. A120-214), recommending that Sun

be awarded \$3,820,120, including profit. The Board, after allowing oral argument and "after careful review and study of the entire record and after much deliberation," also issued an exhaustive decision (Pet. App. A31-A118) modifying the hearing examiner's recommended decision. The Board held that Sun was entitled to an award of \$2,798,882.35 (Pet. App. A119).

The Secretary of Commerce, upon petition, exercised his discretion to review the case and determined that, when claims "not easily susceptible to mathematical or other precise calculation" were at issue, "the Board should not have departed from the examiner's findings for which there was substantial factual support" (Pet. App. A27). The Secretary concluded, therefore, that "the claim items relating to the extent of pre-contract delivery date delay, the estimated number of service hours per month during the delay period, and the estimates of disruption effect in terms of production and congestion, should be disposed of in accordance with the examiner's views" (*ibid.*). In all other respects, the Secretary adopted the Board's decision. Accordingly, on January 20, 1972, the Secretary found that petitioner was entitled to the sum of \$3,070,547.95 (Pet. App. A28). On February 15, 1972, the Secretary declined to reconsider his decision (Pet. App. A29-A30).

2. USL refused to pay its portion of this award, asserting that the amount was excessive. The Board paid its portion of the award but refused to pay USL's part. Petitioner then brought this suit in the Court of Claims (pursuant to the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 321) seeking to increase the award to an amount "in excess of" \$7,000,000 (Pet. App. A9). The United States thereafter asked that notice of the action be issued to USL and

USL answered petitioner's complaint by seeking to reduce the amount of the award.¹

The trial judge of the Court of Claims held that substantial evidence supported the Secretary's decision on the "delay" issue and on the "normal hull production rate" issue (Pet. App. A10-A17; A22-A25) but not on the "hire-fire costs" issue (Pet. App. A18-A22). On May 28, 1976, the Court of Claims held that the Secretary's decision was supported by substantial evidence on all three issues (Pet. App. A2-A25).

3. Petitioner contends (Pet. 10-27) that there was not substantial evidence to support the Secretary's factual findings on the "delay" and the "hire-fire costs" issues. The Court of Claims correctly rejected that contention in an opinion on which we rely.

Regarding the "delay" issue, the Court of Claims (adopting the trial judge's recommended decision) found abundant evidence to support the Secretary's decision that Sun could have delivered the vessels only 15 days prior to the dates specified in the contract. The court noted testimony by the Deputy Chief, Office of Ship Construction, Federal Maritime Administration, that the first ship would have been delivered "somewhere between 30 and 0 days prior to contract delivery date had it not been for Changes 23 and 48" and that "under these circumstances, I would say 15 days prior to the delivery date" (Pet. App. A16).²

¹Petitioner also sought to recover from the United States, as indemnitor, USL's share of the award. On May 31, 1974, the Court of Claims granted summary judgment for the United States on this issue. This Court subsequently denied Sun's petition for a writ of certiorari (419 U.S. 1021).

²While petitioner attempts to show inconsistencies in the testimony of this witness (Pet. 14-15), the hearing examiner found

Moreover, the court noted "many delay factors which developed during the course of the construction of the five ships * * * which were related to Change Orders 23 and 48" (Pet. App. A16-A17). Accordingly, the court held that (Pet. App. A17):

even if Change Orders 23 and 48 had not been issued, other delay factors would have prevented Sun from delivering each of the five ships at an earlier date than 15 days prior to the contract delivery date, and, therefore, * * * the issuance of Change Orders 23 and 48 did not cause more than 75 days of delay prior to the contract delivery dates for the five ships. Consequently, it must be concluded that the administrative determination to this effect is supported by "substantial" evidence, even though there is contrary evidence from Sun's witnesses in the record.

Turning to the "hire-fire costs" issue, the Court of Claims held (Pet. App. A3) that the record more than amply supported the Secretary's finding that petitioner failed to establish a causal connection between Changes 23 and 48 and the layoffs of workmen in the outfitting trades:

[T]he Secretary of Commerce could permissibly find this conclusory and summary testimony [cited by petitioner] outweighed by (1) the inability of Sun's Manager of Industrial Relations, who was supposed to support with detail the conclusions of the high officials, to tie the lay-offs specifically to Changes 23 and 48; (2) the fact that under its own original

(Pet. App. A198):

In considering the reliability and probity of all the witnesses who testified on the delay cost issue, the Examiner was impressed by the objectivity, resourcefulness, and breadth of knowledge and experience of this witness * * *.

schedule Sun had anticipated a long delay (so long as to make it unlikely that it would have retained the workers in question) between the launching of the next previous vessel (the *Atlantic Heritage*) and the first of the five ships involved in the present contract; and (3) other simultaneous delay factors (including the interchange of the first two hulls), not attributable to Changes 23 and 48, for which Sun was itself responsible, and which would have made it improbable that the first United States Lines vessel would have been ready in time to receive the laid-off outfitting personnel from the *Atlantic Heritage*.

The evidence supporting the Secretary's decision therefore was more than substantial, and further review of this essentially factual issue is unwarranted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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